HAROLD S. WILLEY, Clerk

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1955

No. 700

A. E. Hoss and SULLENS & HOSS, INC., a corporation,
Petitioners,

vs.

C. G. (JIM) PURINTON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

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To the Honorable Earl Warren, Chief Justice of the United States and to the Honorable Associate Justices of the Supreme Court of the United States:

The above named petitioners respectfully pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled cause, affirming

the judgment of the District Court of the Territory of Alaska, Third Division, filed and entered on December 21, 1955.

Also the judgment denying the petition for rehearing entered and filed January 5, 1956, as shown by the record appended hereto and made a part of this petition for writ of certiorari.

JURISDICTION.

The judgment of the Court of Appeals affirming the judgment of the District Court above enumerated entered as of December 21, 1955, and the judgment denying the petition for re-hearing entered on January 5, 1956, which is not yet officially reported.

Jurisdiction of this Court is invoked under Section 1254 and 2101 of the Judicial Code (Act of June 25, 1948, c. 646, Secs. 1254, 2101; 62 statutes 928, 961; 28 U.S.C. 1254, 2101) and Rule No. 21 and the other rules of the Supreme Court of the United States, affecting petition for writ of certiorari.

STATEMENT OF THE CASE.

C. G. (Jim) Purinton brought this action in the District Court for the Third Judicial Division, Territory of Alaska. His complaint is printed in the transcript filed in the United States Circuit Court of Appeals, Ninth Circuit and made a part of this peti-

tion by reference appearing at page 3 thereof. He alleged A. E. Hoss was an individual, major and dominating stockholder in Timber, Inc., a corporation, and Sullens & Hoss, Inc., a corporation, both organized and existing under the laws of the Territory of Alaska; that the annual corporation license tax due the Territory of Alaska, had not been paid as required by law, and that Timber, Inc. was established as an alter ego of A. E. Hoss for the purpose of conducting a logging and saw mill operation and had never had any genuine corporate existence. That Sullens & Hoss, Inc. was also his alter ego for the purpose of conducting sales business, that it had no genuine, separate existence but was used for the purpose of permitting A. E. Hoss to transact a portion of his individual business under corporate guise. Then alleged the indebtedness due the plaintiff. The defendants all answered, deny any liability whatsoever, pleading full payment of any indebtedness, pleaded a contract entered into August 1, 1952 and prayed to recover on a cross-complaint for money advanced to the plaintiff on the purchase of lumber over and above the amount delivered by plaintiff. A trial was had and the written contract was introduced by defendants, which was entered into between Timber, Inc. by A. E. Hoss, president and C. G. (Jim) Purinton the plaintiff in the trial Court. An exact copy of this contract is printed in the appendix, attached hereto and made a part hereof.

The plaintiff objected strenuously to the admission of the contract because the corporations had neither

complied literally with the law requiring the filing of annual reports.

The defendant contended that even if the plaintiffs' contention was right and that A. E. Hoss was doing business through these two corporations as his alter ego and if the contract was void as between Timber, Inc. a corporation and the plaintiff, then it was still admissible, as the contract of A. E. Hoss, since the theory of the plaintiff's case was that the acts of Timber, Inc., and Sullens & Hoss, Inc., were the individual acts of A. E. Hoss. The Court admitted the contract and then later instructed the jury to ignore it, that it was void and had no effect and could not be considered for any purpose and could avail the defendants of nothing and instructed the jury in such a way that the jury found for the plaintiff on both of the counts against A. E. Hoss and Sullens & Hoss. A great many of the instructions were excepted to and the question raised thereon in the Court below and in the Circuit Court.

It must be conceded that, if the contract is valid, then the plaintiff has no cause of action against any of the defendants and it was the duty of the trial Court to instruct the jury to dismiss the plaintiff's causes of action because the contract, if valid, completely barred any recovery of the plaintiff. Defendant moved for an instructed verdict and moved to dismiss plaintiff's case at the close of the plaintiff's testimony and also at the close of all testimony, which motions were denied and exceptions allowed to the defendants.

Judgment was rendered for the plaintiff and against Sullens & Hoss, Inc. and A. E. Hoss personally but no judgment against the other defendants.

The case was appealed by Sullens & Hoss and A. E. Hoss to the United States Circuit Court of Appeals, Ninth Circuit and affirmed by a *divided Court.*

The majority opinion as written by the Honorable Chief Judge Denman, concurred in by Circuit Judge Bone, being a part of the appendix attached hereto, held that the contract was annulled during the earlier part of the trial under a right given under Section 36-1-122 ACLA 1949, which section is set forth in its entirety in the appendix filed herewith. Also upheld the judgment, that A. E. Hoss was operating his business as Sullens & Hoss, Inc. and Timber, Inc. and was personally liable to the plaintiff by reason thereof and upheld the trial judge in instructing the jury as follows (page 2 of opinion):

> "The trial judge, in instructing the jury, stated: 'I have found that this contract is void as a matter of law, having been declared void by the plaintiff at a time when he had the right so to do, and further because it was not a completely integrated agreement expressing the full understanding of the parties.' "

and based upon this contention, the Circuit Court upheld the judgment of the Court below, by a divided opinion. Circuit Judges Denman and Bone concurring; Circuit Judge Pope dissenting, and in the dissenting opinion it was stated:

"Basic to my line of reasoning is the finding in this case, which is the law of the case, that Timber, Inc. was merely the alter ego of Hoss; that this supposed corporation was only a shell and that not only this but the other corporation as well were mere conduits for Hoss' own business. The judgment against Hoss individually is based upon this finding that it was Hoss who was doing all these acts and carrying on all this business. This finding is reflected in the judgment against Hoss individually for holding him personally could be sustained on that ground only. It follows from this that when Purinton, the plaintiff, entered into the saw-mill and lumber operation he was dealing in truth and in fact with Hoss who was the real party to the arrangement, although the latter purported to utilize the names of these corporations merely as a false front. It is therefore my opinion that since the judgment proceeds upon the theory that this was an arrangement between Purinton and Hoss, it must be considered as an arrangement between two individuals. Whether the named corporations did or did not comply with the various Alaska statutes for filing and paying the fees is therefore beside the point because whether the corporations could or could not in a proper case make a valid contract, it is not the claim of plaintiff that they did make this contract. *On the contrary, it is his claim that he contracted with Hoss individually.*

Now for the purposes of this record it must be taken that there was a written agreement executed by Purinton. This was received in evidence but ruled void by the court. Purinton's theory was that he had a right to declare this

contract null and void because Timber, Inc., with whom it was executed, had not complied with the statute. But it is my view that plaintiff cannot ride his horse both ways. His own theory is, as accepted by the trial court, that his dealings were with Hoss, an individual, using the name Timber, Inc. as his alter ego, or as merely another name for himself. Therefore under this theory, whether as a corporation Timber, Inc. might or might not have made such a contract is immaterial here because it is neither alleged nor found that it did make such a contract. Under the findings the only person who made the arrangements was Hoss individually. Now when that written agreement is examined it will be found that it was a rather carefully drawn arrangement for a joint venture between plaintiff on one hand and Hoss on the other, plaintiff to operate the sawmill, hire help and get $60 per thousand board feet of lumber. This $60 he was to divide into certain named proportions. * * *

This was an apparently valid joint venture agreement so far as plaintiff and Hoss were concerned, and if it was thus executed Purinton has no ground for complaint."

It is our contention that the dissenting opinion of Judge Pope correctly follows the law; that the majority opinion violates Article I, para. 10, cl. 1, which prohibits any law or ruling of a board, commission or Court from *impairing the obligation of contracts.*

The record shows that the tax of both corporations was paid and the reports all filed before the case was finished and before the trial judge instructed

the jury. Another section of the ACLA 1949 provided that this restored all rights of the corporation, 36-6-10 and 36-6-12 ACLA 1949. An exact copy of these sections is printed in the appendix attached.

Section 36-1-122 ACLA 1949, printed in full in the appendix is violative of the Constitution of the United States and especially Article I, para. 10, cl. 1, which prohibits the passage of a law as well as a judgment of a Court, impairing the obligation of contract.

It is quite clear that the contract itself is a perfectly valid contract, but the Court held it void by reason of Sec. 36-1-122 ACLA 1949. This directly violated the constitutional provision, prohibiting impairing the obligation of contracts.

REASONS FOR GRANTING THE WRIT.

First Reason.

This is a petition for writ of certiorari affecting a decision of a *divided Court,* two circuit judges on the majority opinion, one circuit judge on the dissenting opinion.

Second Reason.

The majority opinion is contrary to the decisions of the other circuits in the United States.

Third Reason.

The decision is contrary to the decisions of the Supreme Court of the United States.

We contend that this Honorable Court should grant certiorari and correct this injustice and in support of this position we cite the following cases.

The Circuit Court of Appeals, Second Circuit, in the case of *Coriell v. Morris White, Inc., et al.,* 54 Fed. 2d 253, held, quoting from page 258:

> "It has likewise long been recognized that contract obligations *may not be impaired by the courts.* Huhlker v. N. Y. & Harlem R. R., 197 U. S. 544, 25 S. Ct. 522, 49 L. Ed. 872." (Emphasis ours.)

and the general holding in this case is that:

> "Courts may not impair contract obligation any more than legislatures and private property may not be taken in violation of contract obligations."

This case holds exactly opposite to the effect of the decision of the Ninth Circuit Court of Appeals to which this petition is directed, even though we were unable to get the Ninth Circuit to pass on the constitutional question raised by the record and our briefs.

We rely upon *Union Bank of Richmond, Va., v. Board of Commissioners of Oxford,* Circuit Court, E. D. North Carolina, 90 Fed. 7, the third syllabus being a concentrated statement from the body of the opinion, we quote it as follows:

> "3. Constitutional Law—State Decisions Affecting Obligation of Contracts.
>
> Under the provision of the national constitution which forbids states to make laws impairing the obligation of contracts, *that end can no more*

be accomplished by judicial decisions than by legislation." (Emphasis ours.)

A very old but well considered case is *Western National Bank of New York v. Reckless,* 96 Fed. 70, and from the body of the opinion on page 77, you find a quotation taken from 102 U. S. 203:

> "Where it is laid down broadly that the provision of the constitution of the United States securing the inviolability of the contract is, as a necessary consequence, protective of the remedy."

From the fifth syllabus of *Union Light, Heat & Power Company v. Railroad Commission of Commonwealth of Kentucky,* 17 Fed. 2d 143, you find this statement:

> "State officer cannot, as means of doing wrong forbidden by federal Constitution, proceed on assumption that he is clothed with state authority to do such acts and at same time, for purpose of avoiding federal constitutional provisions, deny that he is clothed with such power, *nor can he proceed in exercise of power in violation of federal constitutional provisions under authority of state to do such acts."* (Emphasis ours.)

This statute that we contend is unconstitutional and in violation of Article I, paragraph 10, which prohibits the passage by any state (which includes the Territory of Alaska) of any statute that in any way impairs the obligation of contract and the legislature of the Territory of Alaska in passing 36-1-122, exceeded its power and if the act should be held to be constitutional, then the Court did not properly

construe the act, because by the construction placed on the act by the trial Court and upheld by the Appellate Court, in this case deprived A. E. Hoss of a perfect defense to the law suit filed against him. Even if the Court could lawfully and without violating the constitutional clause affecting contracts, hold that the contract was void as to Timber, Inc., yet, it was certainly valid as to A. E. Hoss and the trial Court in instructing the jury to not consider the contract in any way, that he had held that it was void, having been avoided by the plaintiff by declaration during the trial of the case, certainly did violence to the constitutional provision, above set forth, as to A. E. Hoss an individual.

The United States Supreme Court has consistently held that the Courts, as well as the legislatures, are prohibited by Article I, paragraph 10 of the Constitution of the United States from doing any act or rendering any judgment or passing any law that impairs or diminishes the obligation of contracts. American Jurisprudence, Volume 12, page 20, paragraph 391 states:

> "391. Degree of Impairment.—Since the prohibition as to the impairment of the obligation of contracts is absolute, the amount and extent of the impairment is immaterial. An act which in any degree, ro matter how slightly, modifies the obligation of a contract, by attempting to relieve one party from any duty under the contract, is repugnant to the constitutional prohibition against the impairment of the obligation of contracts."

and, 392, same text holds:

> "One of the tests of impairment is that the value of a contract has been diminished."

In the case before the Court, a perfectly valid contract was held by the trial Court to be absolutely void and the jury so instructed by reason of Section 36-1-122 Alaska Compiled Laws Annotated and it surely comes squarely within this rule.

We contend that this also violated the 5th amendment of the Constitution by depriving these petitioners of property without due process of law as the contract, as entered into, is property.

This Honorable Court said, in *Bank of Minden, et al. v. Clement,* 41 Supreme Court Reporter 408, which is the same as 256 U. S. 126, passing on the very question involved in this petition for a writ of certiorari, we quote from page 408 of the body of the opinion as follows:

> "In Sturges v. Croninshield, 4 Wheat. 197, 198 (4 L. Ed. 529), opinion by Mr. Chief Justice Marshall, it was said:
>
> 'What is the obligation of a contract and what will impair it? It would seem difficult to substitute words which are more intelligible, or less liable to misconstruction, than those which are to be explained. A contract is an agreement in which a party undertakes to do, or not to do, a particular thing. The law binds him to perform his undertaking, and this is, of course, the obligation of his contract.'
>
> * * * * * * *

"And in Planters' Bank v. Sharp, 6 How. 327, 12 L. Ed. 447, opinion by Mr. Justice Woodbury:

'One of the tests that a contract has been impaired is that its value has by legislation *been diminished. It is not, by the Constitution, to be impaired at all.* This is not a question of degree or manner or cause, but of encroaching in any respect on its obligation, dispensing with any part of its force.' " (Emphasis ours.)

We cite a District Court opinion from the Southern District of Florida, *Brown-Crummer Inv. Co. v. Town of North Miami,* 11 Federal Supplement 73, because the wording in this quotation so clearly constitutes our contention, which is as follows, quoting from page 76:

"The National Constitution forbids the states to pass laws impairing the obligation of contracts. *In cases properly brought before us that end can be accomplished unwarrantably no more by judicial decisions than by legislation."* (Emphasis ours.)

The first and second syllabi from the case of *Murray v. Charleston,* 96 U. S. Reports at page 432, read as follows:

"1. Wherever rights, acknowledged and protected by the Constitution of the United States, are denied or invaded by State Legislation, *which is sustained by the judgment of a State court, this court is authorized to interfere.* Its jurisdiction, therefore, to re-examine such judgment

cannot be defeated by *showing that the record does not in direct terms refer to some constitutional provision, nor expressly state that a Federal question was presented. The true jurisdictional test is, whether it appears that such a question was decided adversely to the Federal right.*" (Emphasis ours.)

"2. The provision in that Constitution, that no State shall pass a law impairing the obligation of contracts, is a limitation upon the taxing power of a State as well as upon all its legislation, whatever form it may assume. *Therefore, a law changing the stipulations of a contract, or relieving a debtor from a strict and literal compliance with its requirements, enacted by a State in the exercise of that power, is unconstitutional and void.*" (Emphasis ours.)

The Supreme Court of the United States in the case of *Seibert v. United States,* Supreme Court Reporter, Volume 7 at page 1190, quoting from page 1194 as follows:

"It had been previously said, upon a review of the decisions of the court, in Von Hoffman v. City of Quincy, 4 Wall. 535, 553: 'It is competent for the states to change the form of the remedy, or to modify it otherwise as they may see fit, provided no substantial right secured by the contract is thereby impaired. No attempt has been made to fix definitely the line between alterations of the remedy which are to be deemed legitimate and those which, under the form of modifying the remedy, impair substantial rights. Every case must be determined upon its own circum-

stances. Whenever the result last mentioned is produced, the act is within the prohibition of the constitution, and to that extent void."

Walker v. Whitehead, 83 United States Reports 314, quoting from page 318 as follows:

"The obligation of a contract 'is the law which binds the parties to perform their agreement.'

Any impairment of the obligation of a contract—the degree of impairment is immaterial—is within the prohibition of the Constitution;"

The Supreme Court of the United States in the case of *Township of Pine Grove v. Tallcott,* 86 U. S. Reports 666, passed on a similar question and on page 678 you find the following statements taken from the opinion of the Court:

"The general understanding of the legal profession throughout the country is believed to have been that they were valid. The National Constitution forbids the States to pass laws impairing the obligation of contracts. In cases properly brought before us that end can be accomplished unwarrantably *no more by judicial decisions than by legislation.* Were we to yield in cases like this to the authority of the decisions of the courts of the respective States, we should abdicate the performance of one of the most important duties with which this tribunal is charged and disappoint the wise and salutary policy of the framers of the Constitution in providing for the creation of an independent Federal Judiciary. The exercise of our appellate jurisdiction would be but a solemn mockery." (Emphasis ours.)

Chief Justice Marshall in 256 U. S. Reports 126, 129 in the case of *Sturges v. Crowninshield,* 4 Wheat. 122, 198, passed on a related question which has been cited with approval in the case of *W. B. Worthen Co. v. Thomas,* found in 292 U. S. Reports at page 426. However, we quote Justice Hughes from his quotation of Justice Marshall from page 432 of last cited case as follows:

> "Bank of Minden v. Clement, 256 U.S. 126, 129, Chief Justice Marshall, in Sturges v. Crowninshield, 4 Wheat. 122, 198, observed that 'it is not true that the parties have in view only the property in possession when the contract is formed, or that its obligation does not extend to future acquisitions. Industry, talents, and integrity, constitute a fund which is as confidently trusted as property itself. Future acquisitions are, therefore, liable for contracts; and to release them from this liability impairs their obligation.' This principle was applied to an exemption of insurance moneys, in relation to antecedent debts, in Bank of Minden v. Clement, supra. The argument of appellee that a judgment is not in itself a contract within the constitutional protection, and that it is competent for the State to alter or modify forms of remedies, is unavailing. The judgment and garnishment in the instant case afforded the appropriate means of enforcing the contractual obligations of the firm of which appellee was a member and the statute altered substantial rights. Gunn v. Barry, supra; Edwards v. Kearzey, supra; Fisk v. Jefferson Police Jury, 116 U. S. 131, 134; Home Building & Loan Assn. v. Blaisdell, 290 U.S. 398, 430."

and further on in the body of the opinion on page 433:

> "But we also held that this essential reserved power of the State must be construed in harmony with the fair intent of the constitutional limitation, and that this principle precluded a construction *which would permit the State to adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them.*" (Emphasis ours.)

Havemeyer v. Iowa County, The Supreme Court of the United States, 3 Wallace 294 the first syllabus clearly explains the decision and we quote this syllabus as follows:

> "1. The case of Gelpcke v. The City of Dubuque (1 Wallace, 175), affirmed and enforced; and the doctrine reasserted, that if a contract, when made, was valid by the constitution and laws of a State, as then expounded by the highest authorities whose duty it was to administer them, no subsequent action by the legislature or *judiciary can impair its obligation.*"

We hesitate to quote state opinions to this Honorable Court, but the case of *Brown v. Ferdon,* 46 Pacific 2d, page 218, the 5th syllabus is so exact in point that we quote it verbatim:

> "Constitutional law 169
>
> Remedy, where it affects substantial rights, is included in terms 'obligation of a contract,' and remedy cannot be altered so as to materially im-

> pair such obligation (Const. U. S. art. I, 10, cl. 1; Const. Cal. art. 1, 16)."

and a part of the opinion commencing on page 219 is as follows:

> "(3) As was pointed out by Chief Justice Hughes in the Blaisdell case, supra: 'The obligations of a contract are impaired by a law which renders them invalid, or releases or extinguishes them (Sturges v. Crowninshield, supra, 4 Wheat. (122) 197, 198, 4 L. Ed. 529 (549)) and impairment, as above noted, has been predicated of laws which without destroying contracts derogate from substantial contractual rights.' He also said (290 U. S. 398, pages 429, 430, 54 S. Ct. 231, 237, 78 L. Ed. 413, 88 A. L. R. 1481): 'The obligation of a contract is the law which binds the parties to perform their agreement.' Sturges v. Crowninshield, 4 Wheat. (122) 197, 4 L. Ed. 529 (549)."

CONCLUSION.

In conclusion we must say that unquestionably a perfectly valid contract was, through error of the trial Court, destroyed completely and by obliterating the effect of the contract the plaintiff was given a judgment against these petitioners for more than $5,000.00 when with the contract in force he could have recovered nothing. Therefore, the portion of the constitution prohibiting impairing the obligation of

contracts has been violated and the writ should be granted.

Dated, Anchorage, Alaska,
February 15, 1956.

Respectfully submitted,
BAILEY E. BELL,
Attorney for Petitioner.

WILLIAM H. SANDERS AND JAMES K. TALLMAN,
Of Counsel.

(Appendix Follows.)

Appendix

United States Court of Appeals for the Ninth Circuit.

A. E. Hoss and Sullens & Hoss, Inc., a corporation, *Appellants,* vs. C. G. (Jim) Purinton, *Appellee.*	No. 14,387 Dec. 21, 1955

Appeal from the District Court for the District of Alaska, Third Division

Before: DENMAN, Chief Judge and BONE and POPE, Circuit Judges

Denman, Chief Judge:

This is an appeal from a judgment of the United States District Court for the District of Alaska awarding damages to Purinton on the special findings of a jury on two causes of action. One cause of action, which we first consider, was for advances made by Purinton at the request and for the benefit of appellants for which the jury found them liable.

(A) *The liability of appellants for advances by Purinton.*

Appellant Sullens and Hoss is a corporation. It and Hoss owned and operated a lumber mill through

a corporation, Timber, Inc., which they created and controlled. Purinton was the superintendent of the mill and made advances of moneys for its operation which the jury's special verdict held amounted to $2,306.81, an amount not questioned here by the parties.

Appellants contended at the trial that Purinton was not entitled to recover for his advances for expenses of running the sawmill because of the terms of an express contract providing for his compensation out of the profits of the mill. Purinton voided this contract when he filed the instant suit.

The trial judge, in instructing the jury, stated:

> "I have found that this contract is void as a matter of law, having been declared void by the plaintiff at a time when he had the right so to do, and further because it was not a completely integrated agreement expressing the full understanding of the parties."

The jury was instructed to give no effect to the contract in reaching its verdict. The appellants contend this was error.

Purinton declared at the beginning of the trial that he had avoided the alleged contract between himself and Timber, Inc. on the ground that it was voidable under Section 36-1-122, A.C.L.A., 1949. That section requires corporations annually to file with the Auditor of the Territory of Alaska and with the Clerk of the District Court in each Division where they do business a report of their financial condition. The section further provides:

> "And if any corporation shall fail to file its annual reports as required in this section, *all contracts* made by such corporation with the residents of the Territory of Alaska, made in the Territory, *shall be voidable as to the corporation during the time it shall neglect to file such report,* and no Court in the Territory shall enforce same in favor of the corporation." [Emphasis added.]

Timber, Inc., filed no annual reports for 1951, 1952 and 1953 until two and three days after this suit was commenced and after Purinton had stated he was avoiding the contract.

Appellants urge that Section 36-1-122 does not prevent them from asserting the alleged contract as a defense. They first contend that it must be read in conjunction with Sections 36-6-9, 36-6-10 and 36-6-12 which deal with striking from the records Alaskan corporations which fail to pay the annual corporation tax for two years and reinstatement of such corporations. Section 36-6-12 reads:

> "[After reinstatement] . . . such corporation shall have and enjoy the same rights and powers as if its name had never been stricken from the records, and all things done by it in the exercise of its corporate powers before such reinstatement are hereby validated and confirmed."

Appellants contend that §36-1-122 and §36-6-12 should be construed together. Assuming they were so to be construed, appellants would have the words "no court in the territory shall enforce same [a contract avoided] in favor of the corporation" mean no

more than that a corporate creditor who has avoided the contract shall be withheld from suing on it so long as the corporation chooses to continue to violate §36-1-122 by not filing its reports.

That is to say, such a debtor corporation having already violated the act for three years might continue to violate it for another three years or indeed ten years, until the creditor litigant against it had lost his witnesses and other evidence and then have validated the voided contract. When it finally complied with the statute, it well could argue that since it "shall have and enjoy the same rights and powers as if its name never had been stricken," it then could plead the expiration of the statute of limitations on suits on such contracts. It could reenforce that unjust argument by pointing out that while under §36-6-12 *its* "rights" were restored no provision was made for restoring the rights of its creditors.

Furthermore, in any event since as decided in the instant case the interest runs only from the date of the judgment the corporation could avoid interest on the damages for the breach of the contract for as long as it chose to violate the law.

We think the Alaska legislature intended none of these absurdly unjust results in enacting these sections and that the words of §36-6-12, "all things done by it . . . before such reinstatement are hereby validated and confirmed" apply to the things done by "it" and not the thing done by Purinton in avoiding the contract. The legislature meant exactly what it said in the words of §36-1-122 that "no court in the

Territory shall enforce same in favor of the corporation."

However, we do not agree that these two statutes, 36-1-122 and 36-6-12 should be considered together. 36-6-12 affords relief only from the striking of the name of the corporation from the records of the Auditor's office for neglect for two years of payment of the annual corporation tax, provided for in §36-6-9, an entirely different offense from failing to file the reports required by §36-1-122.

This appears from the italicized matter in the two statutes as follows:

> "36-6-9. Striking from record name of corporation failing to pay tax. It shall be the duty of the Auditor of the Territory of Alaska to *strike from the records of the office* the names of all corporations which have neglected, or which shall hereafter neglect, for a period of two years, to pay their annual corporation tax. [L 1921, ch. 22, para. 8, p. 81; am. L 1929, ch. 118, para. 6, p. 282; CLA 1933, para. 1919.]
>
> "36-6-12. *Effect on rights and powers of corporation.* Thereafter such corporation shall have and enjoy the same rights and powers *as if its name had never been stricken from the records,* and all things done by it in the exercise of its corporate powers before such reinstatement are hereby validated and confirmed. [L 1921, ch. 22, para. 11, p. 82; CLA 1933, para. 1022.]" (Emphasis added.)

The district court properly held that the alleged contract between Purinton and Timber, Inc., was

voided under §36-1-122 and that it was not revived by the subsequent filing of its annual reports. The contract was void for all purposes and could be used for no purpose by Timber, Inc.

Appellants further contend that they did owe these moneys that Purinton paid but that it was owed by Timber, Inc., only. Purinton contended that Timber, Inc., was merely the alter ego of Hoss and the court instructed the jury it so could find and hold Hoss liable on an implied contract, which it did.

We think there was abundant evidence to support this instruction. It never issued any stock at all to any shareholder. It made none of the annual reports of its transactions required by the Alaska law. Section 36-1-122, A.C.L.A., 1949. No stockholders meetings were ever held. The minutes of purported directors meetings were prepared and signed by those who did not attend. Before the transactions here involved, the directors meeting of August 14, 1951 gave to Hoss the entire power to conduct the corporate affairs. From that time to February, 1953, when Purinton ended his employment begun on July 15, 1952, no directors action was had.

The only asset was the mill which was mortgaged for its purchase price to Sullens and Hoss and afforded no basis for realizing claims against the corporation such as Purinton's. Hoss testified that two persons he named and others unnamed, had agreed to become stockholders. None did and the jury well could have not believed any of his statements. All the lumber manufactured by Timber, Inc., was trans-

ferred to the corporation, Sullens and Hoss, which produced testimony that there were certain advances to pay for it. Purinton testified that these advances were not made and the jury could have believed him; and regarded the transaction as a mere act of Hoss in his alter ego capacity. Furthermore, Hoss, though claiming Timber, Inc., had such assets, and relying on the defense last considered that the corporation was not liable, did not have Timber, Inc., appeal from the judgment.

With regard to Sullens and Hoss, this corporation was formed by these two men, Sullens, however, ceasing to have any interest therein before the events pertinent here. There is abundant similar evidence for the determination by the jury that it was dominated and controlled by Hoss as his alter ego.

The evidence supports the Court's instruction that the jury could find that both these corporations were mere conduits for Hoss' own business and that he became liable for Timber, Inc.'s debts. Ramish v. Langhorn, 86 F.2d 686 (Cir. 9, 1936); Telis v. Telis, 132 N.J. Eq. 25, 26 A.2d 249 (1942); Pohlman Investment Co. v. Virginia City Gold Mining Co., 184 Wash. 273, 51 P.2d 363 (1935); Stark v. Coker, 20 Cal.2d 839, 129 P.2d 390 (1942).

It has been suggested that Purinton is taking inconsistent positions when he asserts (1) a right to avoid the joint-venture contract with Timber, Inc. on the ground that it had failed to file the required annual reports, and (2) a right to a personal judgment against Hoss on the ground that Timber, Inc.

was only his alter ego. There is no inconsistency. Such a suggestion ignores the reasons for the doctrine of looking through the corporate entity and for the penalty imposed by the Alaska statute for failure to file annual reports.

The suggestion assumes that either the corporation exists or does not exist for any and all legal purposes. This is not so. Each corporate contract must be examined independently to determine whether the circumstances justify looking through the corporate entity and affixing liability on a shareholder. The Timber, Inc.-Purinton joint-venture contract was voidable under Alaska law. Hoss cannot assert that Timber, Inc. did not exist and therefore was under no obligation to file reports. Hoss selected this method of operating his business and must take the consequences. On the other hand, the jury was free to award a judgment against Hoss to avoid the injustice of allowing him to hide behind the undercapitalized corporate entity of Timber, Inc. for the reasons discussed above.

If the court were to hold that Timber, Inc. did not exist for any purpose and therefore had no obligation to file annual reports, it would be holding in effect that one who failed to properly capitalize a corporation for the protection of its creditors would have the advantages of its contracts even though no reports were filed while one who set up a fully capitalized corporation and failed to file reports would have no such advantage. Courts do not look through a corporate entity to give advantages to the one who purposefully undercapitalizes it.

Appellants contend the court erred in overruling their motion to exclude the testimony of Hoss' divorced wife as to occurrences before the divorce, she having been permitted to testify regarding her absence from dirctors meetings and her belief none were held. She gave no testimony of private communications between herself and her husband.

We think §58-6-3 of the Alaska Code relied on by appellants, plainly indicates the contrary. It reads:

> "A husband shall not be examined for or against his wife, without her consent, nor a wife for or against her husband, without his consent; nor can either, *during the marriage or afterwards,* be, without the consent of the other, examined *as to any communications made by one to the other during marriage . . .*" (Emphasis added.)

The cases hold that while a wife, after she is divorced, cannot be examined as to communications between her and her husband made during marriage, she may testify for or against her husband as to other matters. See, e.g., Cohen v. United States, 120 F.2d 139 (Cir. 5, 1941); United States v. Gonella, 103 F. 2d 123 (Cir. 3, 1939); Yoder v. United States, 80 F. 2d 665 (Cir. 10, 1935); 8 Wigmore on Evidence, §2237 (3d ed. 1940); 46 Mich. L. Rev. 664, 672 (1948).

(B) *Purinton's claim for the non-payment of $2,700 for the sale of lumber by him to Hoss and the corporation of Sullens and Hoss.*

Purinton's complaint states his claims in paragraph V as follows:

> "That on or about the 1st day of March, 1953, plaintiff sold and delivered to the defendant, A. E. Hoss, acting through his alter ego, Sullens & Hoss, Inc., approximately 45,000 board feet of lumber at an agreed price of $60.00 per thousand feet, of a total value of Two Thousand Seven Hundred ($2,700.00) Dollars; that by reason of the said purchase, defendants, A. E. Hoss and the alter ego, Sullens & Hoss, Inc., became indebted to the plaintiff in the sum of Two Thousand Seven Hundred ($2,700.00) Dollars."

Hoss and Sullens and Hoss' answer admit the sale of lumber by Purinton of more than the $2,700 in value and claim the amount due was paid by them to Purinton. Appellants offered testimony that Purinton so had been paid for the lumber and Purinton testified he had not been paid. The court submitted to the jury the question whether Purinton had been paid for the lumber. The jury was entitled to accept Purinton's testimony that he had not been paid and to award the damages claimed in the complaint.

The judgment on the two verdicts is affirmed.

POPE, Circuit Judge, dissenting.

Basic to my line of reasoning is the finding in this case, which is the law of the case, that Timber, Inc. was merely the alter ego of Hoss; that this supposed corporation was only a shell and that not only this but the other corporation as well were mere conduits

for Hoss' own business. The judgment against Hoss individually is based upon this finding that it was Hoss who was doing all these acts and carrying on all this business. This finding is reflected in the judgment against Hoss individually for holding him personally could be sustained on that ground only.

It follows from this that when Purinton, the plaintiff, entered into the saw-mill and lumber operation he was dealing in truth and in fact with Hoss who was the real party to the arrangement, although the latter purported to utilize the names of these corporations merely as a false front. It is therefore my opinion that since the judgment proceeds upon the theory that this was an arrangement between Purinton and Hoss, it must be considered as an arrangement between two individuals. Whether the named corporations did or did not comply with the various Alaska statutes for filing and paying the fees is therefore beside the point because whether the corporations could or could not in a proper case make a valid contract, it is not the claim of plaintiff that they did make this contract. On the contrary, it is his claim that he contracted with Hoss individually.

Now for the purposes of this record it must be taken that there was a written agreement executed by Purinton. This was received in evidence but ruled void by the court. Purinton's theory was that he had a right to declare this contract null and void because Timber, Inc., with whom it was executed, had not complied with the statute. But it is my view that plaintiff cannot ride his horse both ways. His own

theory is, as accepted by the trial court, that his dealings were with Hoss, an individual, using the name Timber, Inc., as his alter ego, or as merely another name for himself. Therefore under this theory, whether as a corporation Timber, Inc. might or might not have made such a contract is immaterial here because it is neither alleged nor found that it did make such a contract. Under the findings the only person who made the arrangements was Hoss individually. Now when that written agreement is examined it will be found that it was a rather carefully drawn arrangement for a joint venture between plaintiff on one hand and Hoss on the other, plaintiff to operate the sawmill, hire help and get $60 per thousand board feet of lumber. This $60 he was to divide into certain named proportions: $17 to the logger, $2.00 to the Forest Service, $3.33 to fuel, etc. charges, and certain units of the final $18.83 to go to plaintiff and other workmen in full for their services.

This was an apparently valid joint venture agreement so far as plaintiff and Hoss were concerned, and if it was thus executed Purinton has no ground for complaint. Assuredly he cannot sue his joint venturer otherwise than in equity for an accounting, and the record would seem to indicate that he got all he was entitled to under that contract. It is true that there was some effort on the part of Purinton to claim that this written agreement which admittedly he signed was not executed in good faith, but was a mere sham to deceive creditors of Hoss and to make them believe that the sawmill would keep operating as a go-

ing enterprise. Under the better rule such claim of sham is not a defense to a written agreement of the kind here involved when the effort is to show that the writing was designed to deceive third persons. As stated by the Supreme Court of Montana, Higby v. Hooper, 124 Mont. 331, 221 P. 2d 1043, 1053, "The law does not allow parties to a contract to show that it was got up as a sham to deceive and defraud". In so holding that court was following the views of Mr. Wigmore. See Wigmore on Evidence, 3d edition, §2406, Vol. 9, p. 18.

It is true that some courts have disagreed with Mr. Wigmore and with Montana and the other courts which follow the Montana rule but even if the contrary rule should be accepted here for Alaska it would not help the plaintiff in this case for before it could be said that the contract was a sham, evidence on both sides would have to be received, and there would have to be a finding of fact. Of course no such issue was before the jury in this case for the court would not permit the jury to consider the written contract for reasons which I have previously indicated were completely irrelevant. I favor the adoption of Wigmore's view that a contract of this kind cannot be impeached as sham.

As is apparent from a reading of the majority opinion, there have been inserted three paragraphs, immediately preceding the discussion of the testimony of Hoss' former wife, in an effort to counter the position which I have here stated. That effort lacks logic or reason.

The judgment against Hoss individually is not based on any provision of any Alaska statute. Neither §36-1-122, relating to filing of annual reports, nor any other section, provides that for non-compliance, the stockholders or incorporators shall be individually liable. Hoss' individual liability was based, under the court's instructions, upon a finding that Timber, Inc. did not really function as a corporation, but was a "mere conduit" for Hoss' own business. It followed then, that the dealings were those of Hoss, individually, acting through his "alter ego". But what dealings were they? The dealings were those stated in writing, in the so-called Master Contract, a contract for a joint venture. In line with what became the law of this case, if a shell of a corporation like Timber, Inc. agreed to buy a carload of apples, its sole owner could be held liable upon that agreement, but he would hardly be liable upon a court-manufactured agreement to buy a carload of coal. The only contract Purinton had was one of joint venture. Granted that Hoss is liable on that, how can he be held liable for sums which neither he nor anyone else ever agreed to pay? Because the arrangement with Purinton was an express one, with definite and explicit terms, the attempt to make Hoss liable on some entirely different obligation is wholly without legal basis.

The judgment should be reversed.

(Endorsed:) Opinion and Dissenting Opinion. Filed Dec. 21, 1955.

Paul P. O'Brien, Clerk.

United States Court of Appeals for the Ninth Circuit.

No. 14,387

A. E. Hoss and Sullens & Hoss, Inc., a corporation,
Appellants,

vs.

C. G. (Jim) Purinton,
Appellee.

JUDGMENT.

Appeal from the District Court for the District of Alaska, Third Division.

This cause came on to be heard on the Transcript of the Record from the District Court for the District of Alaska, Third Division, and was duly submitted.

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed, with costs in favor of the Appellee and against the appellants.

It Is Further Ordered and adjudged by this Court that the Appellee recover against the Appellants for his costs herein expended and have execution therefor.

(Endorsed:) Judgment Filed and Entered: December 21, 1955.

Paul P. O'Brien, Clerk.

"36-1-122 Annual report: Filing: Contents: Penalty for failure to file. Every corporation formed under this article (36-1-1—36-1-35, 36-1-91—36-1-122, 36-1-132, 36-1-133, 36-1-143—36-1-148 herein), shall annually, within sixty days from the first day of January of each year, file with the Auditor of the Territory of Alaska and with the clerk of the District Court in each Division wherein business of the corporation is conducted, a report made and verified by the president and the treasurer and shall keep a copy thereof at its main office for inspection of stockholders, which shall state:

1. The amount of its capital stock and the amount actually issued.

2. The amount of its debts.

3. The amount of its assets.

4. The names and addresses of all the directors and officers of the corporation.

Any corporation organized under the provisions of this title whose fiscal year ends at any other time than the end of the calendar year, shall be allowed sixty days from the date on which its fiscal year ends within which to file this report.

And if any corporation shall fail to file its annual reports as required in this section, all contracts made by such corporation with the residents of the Territory of Alaska, made in the Territory, shall be voidable as to the corporation during the time it shall neglect to file such report, and no Court in the Terri-

tory shall enforce same in favor of the corporation. If any report be not made and filed as prescribed in this section, either of such officers who shall thereafter refuse or neglect to make and file such reports within ten days after a written request to do so shall have been made by a creditor or a stockholder of the corporation, shall be under penalty of $50.00 recoverable by such aggrieved creditor or stockholder, for every day he or they shall so neglect or refuse. (L1931, ch 8, 23, p 46; CLA 1933, 923; am L 1935, ch 89, 2, p 183.)"

36-6-10 ALASKA COMPILED STATUTES ANNOTATED.

"36-6-10 Reinstatement of corporation. Every corporation whose name has been stricken for failure to pay its annual corporation tax for two years, is hereby authorized and permitted, on or before ten years from the date said corporation's name was stricken to apply for reinstatement. (L1921, ch 22, 9, p 81; CLA 1933, 1020; am L 1935, ch 39, 9, 187.)"

36-6-12 ALASKA COMPILED STATUTES ANNOTATED.

"36-6-12 Effect on rights and powers of corporation. Thereafter such corporation shall have and enjoy the same rights and powers as if its name had never been stricken from the records, and all things done by it in the exercise of its corporate powers before such reinstatement are hereby validated and confirmed. (L1921, ch 22, 11, p 82; CLA 1933, 1022.)"

EXHIBIT "A"

MASTER CONTRACT.

This Contract, made and entered into by and between Timber, Inc., party of the first part, and Jim Purinton, acting for himself and all persons to be employed to work at the mill owned by Timber, Inc., parties of the second part,

Witnesseth:

That the party of the first part, Timber, Inc., is a corporation organized and existing under and by virtue of the laws of the Territory of Alaska, and as such owns a sawmill in Rocky Bay, Alaska, and does have certain timber rights in that locality, but is unable financially to make payment for labor in the operation of said mill.

And Whereas, Jim Purinton, being an expert Diesel engineer and is confident that he can operate the machinery at said mill to an advantage of the labor employed there and therefore enters into this Master Contract and agrees to hire no one to work at said mill who is not familiar with the Master Contract and who is not willing to sign a written agreement to be bound by all of the terms of said Master Contract.

It is Further Understood and agreed that the lumber cut and loaded on the boat at the dock at Rocky Bay is to net to the persons producing the same the sum of $60.00 per thousand feet, which $60.00 is to be divided as follows, to-wit: $17.00 for each thousand board feet loaded to be given to Jess Poland so long

as the said Jess Poland is doing the logging in a satisfactory and workmanlike manner to meet the requirements of the mill, and if the said Jess Poland should resign or breach his contract or fail to deliver under the terms of said contract, then the said Jim Purinton reserves the right to employ his own logger, who will be paid $17.00 per thousand out of the sale price of said lumber loaded on the boat at the dock in Rocky Bay.

It is Further Agreed that the United States Forestry Service is to receive $2.00 per thousand as stumpage out of every one thousand board feet loaded on said boat; that $3.33 out of each thousand board feet so loaded will go into a special fund in trust to purchase fuel oil, Diesel oil and lubrication; $9.42 out of each one thousand board feet loaded will go into a reserve for replacement and repairs; $9.42 out of each one thousand board feet loaded will be turned over to Timber, Inc., to pay its obligations and as profits, and that said sum will be used to pay present obligations for labor that are outstanding, first, and then the balance to be used as the management of Timber, Inc., so directs.

It Is Further Agreed that the remaining $18.83 out of each one thousand board feet of lumber loaded on said boat is to go to a special fund to be handled by Jim Purinton and is to be divided as follows: All of said funds to be divided into equal units and the edgerman is to draw and receive 1½ units, the sawyer 1½ units, and Jim Purinton 2 units, the cleanup and handy man or helper to draw ¾ of a unit, and each

and every employee at the mill, other than those above mentioned, shall draw 1 unit each, and the proceeds from the sum of $18.83 per thousand board feet shall be so divided.

It Is Further Specifically Agreed that no labor can be done and no one hired on the job who does not sign an obligation to be bound by the terms of this Master Contract, and that no labor liens or lien rights shall be created by the performance of said labor, and each person employed agrees to look to and take for a salary his proportionate share of the $18.83 per thousand board feet and to wait for his or her money until ten days after the lumber is loaded on the boat ready for shipment to Seward.

It Is Further Understood and Agreed that Timber, Inc., has cooking facilities and bunk facilities on the grounds and surrounding the mill and that Timber, Inc., agrees to furnish board and bunks, with the exception of bedrolls, to each employee at an agreed price of $5.75 per day, which sum is only chargeable to the employee when the lumber is duly cut, loaded and payment is due the laborers under the terms of this contract, at which time Timber, Inc., shall deduct from the laborers any board and room charges that are outstanding at any time of distribution of funds.

It Is Further Understood and Agreed that the management of the machinery and the production shall be vested in Jim Purinton and such employees as he may delegate certain powers to which relation to production, it being the duty of Jim Purinton and the employees to use the machinery and equipment

to produce the best grade of lumber possible under the circumstances, and the said Jim Purinton agrees to do said job to the fullest extent of his ability and to exercise the best judgment that he has at all times.

It Is Further Agreed that the marketing and other business for the mill will be handled by A. E. Hoss, who will be given 1 unit share in the distribution, to be handled the same as other labor units above set forth.

Dated at Rocky Bay, Alaska, this 1st day of August, 1952.

Timber, Inc.,
A Corporation;
By /s/ A. E. Hoss,
Its President, Party of the
First Part.

(Seal)

/s/ Jim Purinton,
Party of the Second Part.

Attest: /s/ M. W. Hoss,
Assistant Secretary.

Witnesses:

/s/ Arlene Hoss,
/s/ Mary Ann Frazier.

Duly verified.